NO. 48527-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHERYL NICKERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable William C. Houser, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

1. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR DISMISSAL OF THE TAMPERING CHARGE UNDER CrR 8.3(c).

Defense counsel recognized the evidence was insufficient to support the charge of Tampering With A Witness in count 3 and moved to dismiss that charge. The problem, of course, is that she merely challenged probable cause to support the charge instead of moving to dismiss under CrR 8.3(c). See 3RP 4-6.

In response, the State argues that counsel was not ineffective because "the trial court refused to grant her motion until it heard all the evidence." BOR, at 7; see also BOR, at 14 ("the trial court was unlikely to rule until it heard all of the evidence"); BOR, at 20 ("Nickerson had no way of making the trial court rule until the trial court decided it had enough information to make a ruling."). But this argument simply highlights the problem: counsel was deficient by bringing a motion that *could be* deferred until the State had an opportunity to present the offending evidence to jurors. Addressing that motion, Judge Houser properly recognized that, even if he agreed there was an absence of probable cause to support the charge, the State could still present its evidence. 3RP 6; State v. Jefferson, 79 Wn.2d 345, 347, 485 P.2d 77 (1971).

But it is not true – contrary to the State's suggestion – that no means existed to force a ruling prior to presentation of the evidence. Under CrR 8.3(c), defense counsel could have presented the information necessary for a ruling through a declaration setting out the agreed facts and attaching relevant documents, including the Facebook post. CrR 8.3(c)(1). Indeed, under this same provision, the parties could have stipulated to the salient facts, since there was no disagreement as to *what happened* concerning that post. Judge Houser would then have been required to rule in Nickerson's favor if those undisputed facts did not establish a prima facie case of guilt. CrR 8.3(c)(3) (the court "shall" dismiss the charge where standard met). And we know from Judge Houser's ruling, at the close of the State's case, that this standard was met.

Citing State v. Rempel, 114 Wn.2d 77, 785 P.2d 1134 (1990), the State now asserts that Judge Houser "may have erred" in dismissing count 3 when he finally did so and for the notion Judge Houser would not have granted a pretrial motion to dismiss under CrR 8.3(c). BOR, at 11-14. The State also describes the issue of sufficiency of the evidence on count 3 as a "close call." BOR, at 14. The record says otherwise.

Under RCW 9A.72.120(1), a person is not guilty of witness tampering unless she attempts to induce a witness to testify falsely, not show up at court, or withhold information from law enforcement. Judge Houser found that "it's clear" there was no request by Nickerson that Reed engage in any of these behaviors. 4RP 256. Thus, the only question was whether an inducement could be inferred from the Facebook posting. 4RP 256. On that question, Judge Houser noted that, in Rempel, the Supreme Court found that even where the defendant asked the victim to "drop the charges" because they were going to ruin his life, the evidence was insufficient to prove the necessary inducement.[1] 4RP 257. Judge Houser then added:

> The words that were used in this case on this Facebook page don't even come close to what is heard in the Rempel case. And I'm going to grant the defendant's motion to dismiss the tampering with the witness case for insufficient evidence.

RP 257 (emphasis added). Judge Houser did not find this to be a "close call." Nor is there any other reason to believe a pretrial motion under CrR 8.3(c) would have failed.

All that need be shown for ineffective assistance of counsel is a "reasonable probability" a CrR 8.3(c) motion would have been

---

[1] More specifically, in Rempel, the defendant repeatedly called the victim, said he was sorry, asked her to drop the charges of trespass and attempted rape, and indicated they would ruin his life. Rempel, 114 Wn.2d at 81-82.

successful. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Based on Judge Houser's ultimate analysis and ruling, there is certainly a reasonable probability here.

In her opening brief, Nickerson discussed this Court's opinion in State v. Harris, 164 Wn. App. 377, 263 P.3d 127 (2011), at length. See BOA, at 14-17, 20-21. In Harris, this Court could not conceive of a legitimate strategy behind defense counsel's failure to file a CrR 8.3(c) motion where counsel was clearly convinced the evidence was insufficient to prove one of two assault charges. Id. at 388 n.6. This Court concluded that, had a proper motion been filed, the charge likely would have been dismissed and jurors prevented from hearing the prejudicial information associated with it. Id. at 389 n.7. This Court also found that the prejudice from counsel's failure to act was compounded by counsel's further failure to request a curative instruction preventing jurors from considering the evidence when assessing the remaining charge. Id. at 388 n.6.

In her opening brief, Nickerson pointed out the distinct parallels between what happened in Harris and what happened at her

trial. Curiously (and tellingly), the State does not acknowledge Harris much less distinguish it or challenge its analysis.[2]

Regarding prejudice, Nickerson's opening brief discusses in detail the significant evidence of her criminal past revealed with admission of the Facebook post, including revelations she had been convicted for a drug offense. BOA, at 17-19. Admission of the post also led to testimony from both Reed and Detective Rauback regarding the post's serious negative impacts on Reed and her family, including her children. BOA, at 19-20. Not only was this evidence irrelevant to the current charges, it was unfairly prejudicial, suggesting Nickerson was a bad person (even willing to put Reed's children at risk), with a propensity to commit drug offenses, and therefore more likely to have committed the charged crimes in March 2014. BOA, at 18-20.

In response, the State argues that – even with a timely and successful motion to dismiss count 3 under CrR 8.3(c) – the

---

[2] The State observes that, in addition to challenging probable cause to support count 3, defense counsel also included a pretrial challenge to the charge on First Amendment grounds, suggesting this is somehow a problem for Nickerson. See BOR, at 10, 20. But the State never explains how this excuses counsel's failure to file a CrR 8.3(c) motion. A successful CrR 8.3(c) motion would have rectified any First Amendment concerns with exclusion of the Facebook post. In any event, in Harris defense counsel also challenged the charge at issue on alternative grounds (constitutional vagueness and sufficiency). Harris, 164 Wn. App. at 381. Yet this did not insulate trial counsel from a claim he was ineffective for failure to act under CrR 8.3(c).

Facebook post would have been admitted as an admission of a party-opponent relevant to "consciousness of guilt." BOR, at 14-15. More specifically, the State argues that Nickerson's post is an admission that she knew Reed prior to the controlled buys. Moreover, the State asserts that because the post mentions their relationship from drug court, it bolsters Reed's testimony that she targeted Nickerson because of her prior drug use. BOR, at 15.

But no one ever disputed that Nickerson and Reed knew each other. That was apparent from the fact the two interacted on March 5 and again on March 12, 2014. And Reed's reason for targeting Nickerson was (beyond mere propensity) irrelevant to whether Nickerson sold Reed drugs on those two dates. Whatever slight probative value can be gleaned from admission of the post and testimony concerning its impacts, it was far outweighed by the significant dangers of unfair prejudice and an emotional response from jurors. See BOA, at 18-20 (citing ER 403, 404(b)).

The State also cites State v. Moran, 119 Wn. App. 197, 81 P.3d 122 (2003), review denied, 151 Wn.2d 1032, 95 P.3d 351 (2004), arguing similarity to Nickerson's case. BOR, at 19. But it is easily distinguished in all pertinent respects. At issue in Moran was the trial court's admission of a letter from Moran to a friend asking

that friend to talk to a witness, who had come to believe Moran was guilty of murder, in an attempt to get the witness to say favorable things about him. Id. at 217-218. The letter also contained some possibly prejudicial content (Moran used foul language and used the word "homie," which he feared might be misconstrued as some kind of gang reference). Id. at 218. Because Moran's letter was reasonably interpreted to be an effort to change the witness's position, this Court found that the trial court had not abused its discretion in concluding the letter's probative value outweighed the risk of prejudice. Id. at 219.

Unlike Moran, this Court is not simply reviewing a trial judge's decision for abuse of discretion. Rather, the pertinent issue is whether – in light of a pretrial dismissal of count 3 under CrR 8.3(c) – Judge Houser would nonetheless have admitted the Facebook post and testimony concerning it. He would not have. Judge Houser found no express or implied attempt by Nickerson to induce Reed to testify falsely. And, unlike the trial judge assessing the intent behind Moran's letter, there is no indication Judge Houser believed Nickerson's post was an attempt to convince Reed to change her testimony. See 4RP 256-257. Moreover, unlike the speculative and comparatively insignificant prejudice that may have flowed from

admission of Moran's letter, the improper prejudice necessarily flowing from admission of Nickerson's Facebook post (including its revelation of past drug offenses) was substantial.

In summary, there is no indication Judge Houser would have admitted the Facebook post or the testimony from Reed and Detective Rauback concerning the post and its impact in the absence of count 3. His pretrial ruling generally precluding the State's use of evidence concerning Nickerson's criminal history, including convictions, arrests, or prior drug use, lends additional support to the conclusion he would have refused the evidence. CP 18, 20 (motions 5 and 8); 3RP 25.

One last point on this issue. Although the State argues that any CrR 8.3 motion would have failed and that the Facebook post was admissible independent from the tampering charge in count 3, nowhere does the State claim - assuming it is wrong on both these points – that any error in the admission of the post was harmless. Nor can it. Unlike many cases involving controlled buys, in the absence of this improper evidence, there were significant reasons to doubt Reed's version of events, including the lack of a strip search prior to the buys, the absence of any third-party witness to the alleged buys, the failure of law enforcement to determine whether Nickerson

possessed buy money, and Reed's strong incentive to implicate Nickerson, thereby avoiding her own criminal charges.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO OTHER EVIDENCE OF NICKERSON'S PRIOR CRIMINAL HISTORY.

As discussed in Nickerson's opening brief, defense counsel also was ineffective for failing to object to testimony that strongly suggested or established Nickerson had sold drugs to Reed in the past, that Nickerson herself was using drugs at the time of the buys, and that Nickerson had a history of criminal convictions (I/LEADS, booking photo, drug court). See BOA, at 22-24.

The State's primary response is that most of this evidence had already been revealed in the Facebook post, which was independently admissible even in the absence of the tampering charge in count 3. See BOR, at 21. As just discussed, however, the post would not have been admitted with a timely motion under CrR 8.3(a) disposing of the charge. Therefore, the additional testimony to which counsel did not object was not properly admitted.

The State also notes that defense counsel herself elicited from Reed, on cross-examination, the fact she met Nickerson in drug court. See BOR, at 21 (citing 4RP 168). But this is one of the

identified acts of incompetence by defense counsel. See BOA, at 23. Defense counsel likely asked about this because she knew it would be revealed anyway with admission of the Facebook post. And that post was only admissible because counsel had failed to move under CrR 8.3(a) for dismissal of the charge in count 3. Counsel's question does not undermine Nickerson's claim of ineffective assistance; it bolsters it.

As to Detective Whatley, the State argues that his testimony further establishing Nickerson's criminal past (his identification of her through I/LEADS and recognizing her from a "booking photo") added little given the evidence establishing Nickerson's participation in drug court. See BOR, at 24 ("Objections here would have been an attempt to close the barn door after the defense had allowed the horses to escape."). But this additional testimony reminded jurors of Nickerson's criminal history, increasing the likelihood it would remain on jurors' minds as they deliberated Nickerson's fate. Counsel had at her disposal a pretrial ruling prohibiting testimony concerning Nickerson's criminal past yet failed to take advantage of it.

This evidence, in conjunction with admission of the Facebook post, eased the State's attempt to obtain convictions. It

is additional evidence of deficient performance and resulting prejudice.

3. THE TRIAL COURT COMMENTED ON THE EVIDENCE AND DENIED APPELLANT A FAIR TRIAL.

As discussed in the opening brief, the defense argued that Reed was not credible because she had lied to law enforcement when seeking to work as an informant by promising not to ingest any illegal drugs and then continuing to use drugs in violation of the agreement. See BOA, at 24-25. Judge Houser thwarted this effort, however, when he indicated to Reed – following her testimony for the prosecution – that she was now free from her informant agreement. 4RP 194. Testifying had been an additional condition of this agreement. See Exhibit 15. And the judge's determination that Reed was free from its terms indicated the court's opinion that she had now complied in every respect.

The State responds that Judge Houser's comment was not truly a comment on the evidence because:

> Before Houser's remark, the person in charge of Ms. Reed as CI, officer (then detective) Whatley, had testified that by his lights, the only lights that matter, Ms. Reed had performed her duty under the contract and that contract was fulfilled. The judge's remark, then, simply agreed with the unrebutted testimony of the decision maker's decision that she had done the

> job. As such the remark was superfluous at worst and innocuous otherwise on an issue that was undisputed by the defense; that is, the defense provided no rebuttal to officer Whatley's testimony that the contract had been fulfilled. The factual question had been resolved. . . .

BOR, at 28.

As an initial matter, it is not clear why the State claims Whatley's assessment of Reed's performance under the contract was "unrebutted." It was rebutted by Reed herself (who admitted to drug use in violation of the contract) and even by Whatley (who was caught unaware that his informant had been using all along). 4RP 73-75, 123-124, 144, 173-174, 196-198. That Whatley nonetheless expressed his opinion that Reed fulfilled her agreement did not resolve the issue because jurors might disagree.

Moreover, that Judge Houser "agreed with . . . [Whatley's] . . . decision that she had done the job" does not avoid the problem. It *is* the problem. By indicating his belief that Reed had done everything required of her under the informant agreement, Judge Houser expressed his agreement with Detective Whatley, thereby influencing jurors in a manner that benefitted the prosecution and harmed the defense.

This constitutional violation cannot be deemed harmless beyond a reasonable doubt. The court's comment impaired a legitimate line of argument – aimed at undermining Reed's credibility – in a case where Reed could have hidden drugs on her body prior to each alleged buy, no third party saw or heard an exchange, no buy money was ever recovered, and jurors' verdicts turned on whether they believed an informant with a forgery conviction and a strong motive to incriminate Nickerson to avoid her own legal problems. Reversal is required.

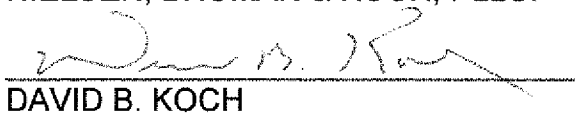
B. CONCLUSION

Alone or cumulatively, the serious errors at Nickerson's trial warrant reversal of her convictions and remand for a new and fair trial.

DATED this 30th day of November, 2016.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

November 30, 2016 - 1:58 PM

Transmittal Letter

Document Uploaded: 6-485273-Reply Brief.pdf

Case Name: Cheryl Nickerson
Court of Appeals Case Number: 48527-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

copy sent to : Cheryl Nickerson, 772045 Washington Correctins Center For Women
9601 Bujacich Rd NW Gig Harbor, WA 98332

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

kcpa@co.kitsap.wa.us
rsutton@co.kitsap.wa.us
kochd@nwattorney.net